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No. 79-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,
Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

The undersigned respondents move to dismiss the writ of certiorari granted in this case on June 16, 1980,[1] on the ground that recent developments have so changed the nature of the case as to either render it moot or, at the very least, demonstrate that the writ should be dismissed as improvidently granted or otherwise inappropriate in the light of the changed circumstances.

GROUNDS FOR THE MOTION

Petitioners and defendant-respondents were named as codefendants in approximately forty treble-damage anti-

[1] Respondents' briefs are currently due to be filed on October 29, 1980. Oral argument, of course, has not yet been scheduled.

trust class actions charging them with fixing the prices of corrugated containers and sheets. Before trial, defendant-respondents settled the plaintiffs' claims for a total of approximately $300 million and were dismissed from the actions. Each of the three petitioners (who, prior to the filing of their petition for certiorari, had not settled with the plaintiffs) sought to assert cross-claims against the settling defendants for contribution in the event that the petitioners proceeded to trial and were found liable to the plaintiffs. The District Court dismissed the proposed cross-claims (J.A. 250); the Court of Appeals affirmed (J.A. 277); and this Court granted certiorari.

However, all three petitioners have now themselves entered into settlements with the plaintiffs. Those settlements, moreover, have been preliminarily approved by the District Court. In addition, as a result of their settlements, none of the three petitioners participated in the trial through the verdict. Accordingly, petitioners are now themselves settling defendants; they occupy precisely the same status as the defendant-respondents; and not one of the petitioners has a true stake in this case to obtain a ruling establishing a cause of action for contribution against settling antitrust defendants.

Petitioners Packaging Corporation of America ("PCA") and Georgia-Pacific Corporation ("Georgia-Pacific") settled prior to the class action trial, which commenced on June 9, 1980.[2] Petitioner Westvaco Corporation ("Westvaco") settled on September 3, 1980, during the course of the trial

[2] On March 20, 1980 PCA reached a settlement with the class action plaintiffs for a sum of $8 million. Georgia-Pacific, along with two other defendants (Potlatch Corporation and Fibreboard Corporation), reached a settlement for a total of $3 million on April 2, 1980. Both settlement agreements received preliminary approval on May 6, 1980 (Pretrial Order No. 50, ¶ 1).

and shortly after it filed its brief on the merits with this Court.[3] Pursuant to its settlement agreement, Westvaco is now taking steps to withdraw its petition and brief. Moreover, as shown more fully *infra* (pp. 4-5), the briefs filed by petitioners Georgia-Pacific and PCA fully concur with the respondents' position that the Court should not establish a contribution cause of action against settling antitrust defendants.

Thus, *not only has each of the three petitioners settled, but in addition none of the petitioners takes the position that settling defendants should be liable for contribution.*

In these fundamentally changed circumstances, there is no remaining "case or controversy" between the parties and the matter is therefore moot. Furthermore, even apart from "case or controversy" and mootness standards, it is now abundantly clear that the case is wholly inappropriate for review by this Court. Certiorari, we submit, would not have been granted if the case had then been in its present posture, and accordingly the writ should be dismissed in the light of these developments.

I.

NO CONTROVERSY EXISTS BETWEEN THE PETITIONERS AND THE RESPONDENTS ON WHETHER SETTLING ANTITRUST DEFENDANTS ARE SUBJECT TO CONTRIBUTION CLAIMS BY NON-SETTLING DEFENDANTS WHO ARE FOUND LIABLE TO PLAINTIFFS.

The cross-claims which were dismissed by the District Court on May 30, 1979 (J.A. 250) were asserted only against *settling defendants*. Thus, the motions filed by petitioner

[3] Westvaco entered into a settlement agreement for $975,000. The District Court gave preliminary approval to that settlement on September 16, 1980 (Pretrial Order No. 57).

Westvaco to assert cross-claims against 26 other defendants (who settled some or all of the class actions for an aggregate sum of approximately $300 million) were against "settling defendants" (J.A. 81, 129). Similarly, the PCA motion was solely against "Settling Defendants" (J.A. 224, 226, 228), and the Georgia-Pacific motion was also solely against "settling defendants" (J.A. 232, 233). And it was on the basis of those cross-claims that petitioners sought and obtained certiorari from this Court.

However, now that certiorari has been granted, none of the three petitioners takes the position that settling antitrust defendants should be subject to contribution claims. As already noted, all three have themselves settled; Westvaco is taking steps to withdraw its petition and brief in this Court; and the briefs filed by the two remaining petitioners, Georgia-Pacific and PCA, do not support contribution claims against settling antitrust defendants.

Although Georgia-Pacific and PCA urge that plaintiffs' claims against non-settling defendants should be reduced by the amount of damages allocable to the settling defendants,[4] such "claim reduction" is fundamentally different from a contribution cause of action to recover against settling defendants, and the Georgia-Pacific and PCA briefs do not support such a cause of action. Thus, in the conclusion of its brief (p. 27), Georgia-Pacific urges that contribution "rights should be enforced . . ., where settlements have occurred, by reducing the settling plaintiffs' claims by appropriate amounts to reflect the portions of such claims that are based upon sales . . . by settling defendants and *by barring contribution claims against those settling de-*

[4] See, e.g., Georgia-Pacific Br. at 22-27; PCA Br. at 5-9.

fendants." (Italics added.) PCA espouses a similar claim reduction theory.

However, the issue of claim reduction is not before this Court. The petitioners first raised the issue in the District Court when they sought leave to amend their answers to assert claim reduction as an affirmative defense. (J.A. 128, 138, 231-32, 241, 245.) These motions were denied. Although the District Court entered a final judgment pursuant to Rule 54(b), Fed.R.Civ.P., with respect to the dismissal of the cross-claims for contribution, it did not do so with respect to the affirmative defense of claim reduction. (J.A. 250-51.) The Fifth Circuit held that the "question dealing with claim reduction is not properly before us. . . . Under these circumstances we have no jurisdiction to consider this issue." (J.A. 277-78.) Not only is jurisdiction lacking over the claim reduction issue, but furthermore Georgia-Pacific and PCA lack standing to assert the issue, since their settlements eliminated any hazard they previously faced that they would be held liable at the class action trial for damages attributable to the conduct of other defendants.[5]

The patent lack of standing of either Georgia-Pacific or PCA to maintain this appeal is recognized by the petition to intervene filed on September 17, 1980 by the sole non-settling defendant, Mead Corporation. Mead's separate complaint for contribution against settling defendants was dismissed on December 21, 1979. Since the dismissal order was entered in a separate proceeding filed by Mead, the dismissal order constituted a final appealable judgment, but Mead elected not to file a notice of appeal from the dis-

[5] Nor do they have standing to assert the issue on behalf of Mead, the only defendant which tried the case through to judgment (see n. 7, *infra*). Mead, of course, is free to pursue its own claim reduction defense in its expected appeal from the jury's verdict against it.

missal order.[6] Accordingly, Mead is not a petitioner in this Court, and its petition to intervene (which shall be answered separately by the respondents) cannot breathe life into a case which is moot and likewise cannot make appropriate review which would otherwise be inappropriate. Having elected to forego (or at least indefinitely defer) any appeal from the dismissal of its contribution complaint, Mead is scarcely in a position to cure other litigants' jurisdictional and procedural defects by trying to invoke, as it were, this Court's original jurisdiction. Furthermore, to the extent that Mead seeks claim reduction with respect to the September 13 verdict against it,[7] Mead is completely free to present the claim reduction issue as part of its expected appeal from the verdict to the Fifth Circuit, and if unsuccessful there may apply to this Court for certiorari on that issue.

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[6] Mead filed its separate complaint on May 21, 1979 in the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civil No. 4-79-245, "alleging the same rights of contribution and claim reduction sought by petitioners." (Motion to Intervene at 2.) The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310. The District Court dismissed the complaint on December 21, 1979. No notice of appeal was filed. Instead, at an as yet indeterminate date, but in any event no earlier than January 3, 1980, Mead filed a motion for reconsideration by the District Court.

[7] On September 13, 1980, at the conclusion of the class action trial, the jury returned a verdict finding Mead guilty on the price-fixing charge.

II.

THE CASE SHOULD BE DISMISSED AS MOOT OR, IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED IN THE LIGHT OF CHANGED CIRCUMSTANCES.

When the petition for certiorari in this case was filed and granted, the case was presented as one in which these three petitioners, stalwartly determined to go to trial on the antitrust claims settled by their co-defendants, sought to pursue contribution claims against the settling defendants in the event judgment should be entered against them at trial. With their settlements, however, Georgia-Pacific and PCA have made their peace and no judgment will be entered against them. As a consequence, they are themselves settling defendants and they have no basis upon which to assert a claim for contribution against other settling defendants.

"[I]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland,* 395 U.S. 784, 788 (1969). This Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964); *SEC* v. *Medical Committee for Human Rights,* 404 U.S. 403, 407 (1972). It has been long recognized that settlement generally renders a case moot. *Stewart* v. *Southern Ry.,* 315 U.S. 784 (1942); *Hammond Clock Co.* v. *Schiff,* 293 U.S. 529 (1934); Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533 at 271 (1975). In this case, any decision by the Court would not "resolve '"a real and substantial controversy admitting of specific relief through a decree of conclusive character. . . ."' " *Preiser* v.

Newkirk, 422 U.S. 395, 401 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). It would only be an "'"opinion advising what the law would be upon a hypothetical set of facts."'" *Ibid.*

The lack of any concrete "case or controversy" is further demonstrated by Georgia-Pacific's and PCA's positions on the question now before the Court. Although they sought contribution against settling defendants in their cross-claims, they no longer advocate such a cause of action and instead espouse claim reduction. But claim reduction is not before this Court, since, as the Court of Appeals held (and Georgia-Pacific and PCA do not contest in their briefs), no appealable judgment dealing with that issue had been entered by the District Court.

Thus, Georgia-Pacific and PCA agree with all respondents in opposing a contribution cause of action against settling defendants. There is no controversy. That being so, the possible relevance of the issue to other pending or future cases does not afford any justification for what would be an advisory opinion by the Court.[8]

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[8] In its motion to intervene, Mead suggests that this case is not moot because "[t]he issue of contribution among antitrust defendants is likely to recur. . . ." (Motion to Intervene at 4.) In support of this proposition, Mead cites *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), and *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). As this Court noted in *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), these cases require that an issue be not only "capable of repetition" but also of "evading review." Mead, like petitioners, cannot show that contribution is that type of legal issue which inherently "evades review", and indeed its citation to *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, cert. pending, No. 79-1144, 48 U.S.L.W. 3570, which also deals with contribution in antitrust cases, belies any such argument. In any event, the existence or lack of other antitrust cases in which contribution has arisen has nothing to do with whether a case or controversy exists in *this* case.

Anticipating the mootness argument in its brief on the merits, PCA asserts that until "expected final approval" of its settlement occurs, it "continues to be a Defendant that has not settled." (PCA Br. at 4.) But regardless of the precise status of the settlement agreements, it is indisputable that Georgia-Pacific and PCA *do not advocate a contribution cause of action against settling defendants.* This is hardly surprising, since these settlements *reverse* petitioners' pecuniary interests; as settling defendants themselves, it would be completely irrational for them to support the imposition of contribution liability on settling defendants, and in fact they do not do so. There are therefore no adverse and antagonistic positions between the parties on the question now before this Court.

This situation is therefore wholly different from *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 465 n.3 (1978), where the Court found that a tentative settlement agreement (which had not been preliminarily approved by the District Court and which had not been reached until after the case had been fully briefed and argued in this Court and was ready for decision) did not moot the appeal. In *Coopers & Lybrand,* even apart from differences concerning the status and timing of the settlement, there was no doubt that the parties held sharply divergent positions on the question before the Court (whether a determination that an action may not be maintained as a class action is a "final decision" within the meaning of 28 U.S.C. § 1291 and therefore appealable as a matter of right). In contrast, no differences of opinion exist between the parties here on the question of whether contribution should be imposed against settling antitrust defendants.[9]

[9] In an effort to ward off dismissal for mootness, the putative intervenor Mead points to the non-class actions (or "opt-out" cases) as "cases or controversies" upon which jurisdiction may attach.

Note continued on page 10.

But even assuming petitioners could demonstrate some residual attenuated interest in this case, the Court should, in its discretion, dismiss the writ of certiorari as improvidently granted in the light of changed circumstances. For even when faced with a case not technically moot, this Court has frequently dismissed certiorari as being improvidently granted when "fuller examination of the case" has disclosed "that the record does not adequately present" the question for review. *McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971). See also, e.g., *Sanks* v. *Georgia*, 401 U.S. 144, 152 (1971); *Piccirillo* v. *New York*, 400 U.S. 548, 549 (1971).

Petitioners' settlements, coupled with their espousal of claim reduction rather than contribution in a settlement context, result in a record insufficient to present adequately the question now before the Court. *Jones* v. *State Board of Education*, 397 U.S. 31, 32 (1970); *Mitchell* v. *Oregon*

Note continued from page 9.

(See Motion to Intervene, p. 5; see also Georgia-Pacific Br. at 3, 27.) But the record is virtually non-existent on the opt-out cases and they played no role in petitioners' arguments below or the decisions below.

In both their petition for certiorari and their briefs on the merits, petitioners have argued for contribution and claim reduction in the context of the allegedly "coercive" settlement atmosphere found in antitrust class actions. Contribution in non-class action cases was not the focus of their arguments and any reliance on such cases at this time in an effort to defeat mootness would be at best a convenient afterthought. This appeal "as respects its main features" has become moot, regardless of "incidental" features such as the non-class cases. *Alejandrino* v. *Quezon*, 271 U.S. 528, 535 (1926).

Furthermore, even assuming the Georgia-Pacific cross-claims could be read as encompassing non-class action cases, there can be no question that the cross-claims were asserted only against *settling* defendants. (See J.A. 233.) And at the time of the dismissal of Georgia-Pacific's cross-claims in May 1979, *no defendant had settled any non-class action case.*

Frozen Foods Co., 361 U.S. 231 (1960). As a result of supervening events, the "focus of this lawsuit has been completely blurred, if not already obliterated," and "any judgment on the important issues involved is potentially immaterial." *Sanks* v. *Georgia, supra,* 401 U.S. at 152 (appeal dismissed; tenants objecting to constitutionality of landlord-tenant provisions voluntarily abandoned premises).

Inasmuch as Georgia-Pacific and PCA agree with respondents that a contribution cause of action should not be recognized against settling defendants and that settlements should be accorded finality, "no controversy any longer exists between the parties as to the question which impelled [the Court] to grant the writ." The Court would only be offering "advance expressions of legal judgment upon issues which remain unfocused," *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961), and which are not directly presented by the record in this case. All of these considerations, even apart from technical mootness standards, "render this case an inappropriate vehicle for this Court's first decision" on the complex issue of contribution among antitrust codefendants. *Jones* v. *State Board of Education, supra,* 397 U.S. at 32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issue raised by the District Court's dismissal of cross-claims for contribution against settling defendants is moot; that, in the alternative, supervening developments have rendered review by this Court inappropriate in the changed circumstances; and that accordingly the writ of certiorari should be dismissed.

Dated: September 24, 1980

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